



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 20, 1995

Ms. Christine T. Rodriguez  
Staff Attorney  
Legal Services, MC 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR95-1531

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26050.

The Texas Department of Insurance (the "department") has received a request for information relating to Bankers Protective Life Insurance Company. Specifically, the requestor seeks "a copy of all regulatory, enforcement and investigative information in your files on Bankers Protective Life Insurance Company." You advise us that the department will make some of the requested information available to the requestor, namely, any information contained in closed files. You have submitted representative samples of the remaining information to us for review.<sup>1</sup> You claim that sections 552.103, 552.107, and 552.111 of the Government Code except the submitted information from required public disclosure.

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You clarified by telephone conversation on December 1, 1995, that the department seeks to withhold from required public disclosure all of the documents you enclosed pursuant to section 552.103 of the Government Code.<sup>2</sup> Section 552.103(a) of the Government Code excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to APA).

You advise us that the requested information relates to an investigation for possible violations of the Texas Insurance Code conducted pursuant to state insurance laws and that you anticipate that the investigation will culminate in a contested administrative case under the APA. Having examined the information submitted to us for review, we conclude that litigation may be reasonably anticipated. We also conclude that the submitted information that you seek to withhold under section 552.103(a) relates to the anticipated litigation.

We note, however, that some of the information you have submitted to us for review is already available to all parties to the anticipated litigation. Generally, when parties to litigation already have copies of the records or have inspected them pursuant to discovery or any other means, section 552.103(a) may no longer be invoked. Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation); *see also* Open Records Decision Nos. 551 (1990) at 4, 511 (1988) at 5, 493 (1988) at 2, 349 (1982), 320 (1982). We have indicated which

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<sup>2</sup>In the future, we suggest that should the department seek to withhold all of the documents the department submits to this office under a particular exception, you expressly say so and, in addition, mark each document as excepted under that exception.

information you may not withhold under section 552.103(a). The remaining information may be withheld from required public disclosure under section 552.103(a) of the Government Code.<sup>3</sup>

You also claim that sections 552.107 and 552.111 of the Government Code apply to your records. We will consider whether either of these provisions applies to the documents that are not protected by section 552.103.

Section 552.107 excepts information if:

(1) it is information that ...an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. *See* Open Records Decision No. 574 (1990). We note, however, that some of the information for which you assert the attorney-client privilege, namely, a copy of rules adopted by the department and a fiscal information sheet, may not be withheld under section 552.107(1). This information does not reveal client confidences to an attorney or reveal an attorney's legal advice. Moreover, we presume that the rules have already been made publicly available. Accordingly, the department must release the approved rules. Thus, we conclude that section 552.107(1) does not except from disclosure any information not covered by section 552.103.

Finally, we consider section 552.111 of the Government Code. Section 552.111 excepts an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. This office also held, however, that section 552.111 does not except purely factual information. *Id.* at 5-6.

We have examined the information submitted to us for review. We conclude that section 552.111 does not apply to any of the information not covered by section 552.103.

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<sup>3</sup>We note that the applicability of section 552.103(a) ends once the litigation has concluded. *See* Open Records Decision No. 350 (1982) at 3. We also note that section 552.103(a) is a discretionary exception, so the department may choose to release the information. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo", with a long, sweeping horizontal line extending from the end of the name.

Kay Guajardo  
Assistant Attorney General  
Open Records Division

KHG/GCK/rho

Ref.: ID# 26050

Enclosures: Submitted documents

cc: Ms. Sue Yoder  
Legal Assistant  
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(w/o enclosures)